

State of California

Public Utilities Commission
San Francisco

MEMORANDUM

Date: June 16, 2014

To: The Commission
(Meeting of June 26, 2014)

From: Kimberly Lippi
Public Utilities Counsel IV

Roxanne L. Scott
Program and Project Supervisor, Communications Division

Subject: Filing Comments in Response to FCC's Request for Comments on a Petition for Declaratory Ruling Filed by the Pennsylvania Public Utility Commission Regarding State Jurisdiction to Adjudicate Intercarrier Compensation Disputes Concerning Dial-Up ISP-Bound Traffic.

RECOMMENDATION: The California Public Utilities Commission (CPUC) should file comments in response to the Federal Communications Commission's (FCC) request for comment on a petition for declaratory order filed by the Pennsylvania Public Utility Commission (Pa. PUC).¹ The Pa. PUC seeks clarification on whether it may adjudicate intercarrier compensation disputes when they arise between competitive local exchange carriers (CLECs) outside of Sections 251 and 252 (47 U.S.C. §§ 251 and 252) of the 1996 Telecommunications Act (Act), specifically when those disputes involve the exchange of local dial-up Internet Service Provider (ISP-bound) traffic. In addition, the petition asks if a state may adjudicate such disputes when, as occurred here, the state commission (Pa. PUC) decision properly enforced the *ISP Remand Order*² and is consistent with FCC rules.³ The Pa. PUC asks the FCC to find that "the Pa. PUC has jurisdiction to adjudicate such disputes so long as the result is consistent with the *ISP Remand Order* and applicable law."⁴ Alternatively, if the FCC disagrees with this finding, the Pa. PUC asks the FCC to issue a declaratory ruling describing the procedures that the Pa. PUC, and possibly other states, should follow to transfer to the FCC all current and future intercarrier compensation disputes and adjudications involving local dial-up ISP-bound traffic exchanged between indirectly interconnected CLECs.

¹ Petition for Declaratory Order of the Pennsylvania Public Utility Commission, WC Docket No. 14-70 (filed April 30, 2014) (Petition), <http://apps.fcc.gov/ecfs/document/view?id=7521124305>.

² *Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001), Order on Remand, 24 FCC Rcd 6475 (2008).

³ Petition at 1.

⁴ *Id.*

The CPUC should file comments in support of the Pa. PUC's request for clarification on this matter. The CPUC should further recommend that the FCC find that state commissions retain jurisdiction to adjudicate such disputes so long as the result is consistent with the *ISP Remand Order* and applicable law.

Comments are due June 30, 2014; reply comments are due July 30, 2014.

BACKGROUND: On May 16, 2014, the FCC's Wireline Competition Bureau (Bureau) released a Public Notice⁵ seeking comment on a petition for declaratory order filed by the Pennsylvania Public Utility Commission (Pa. PUC).⁶ The Pa. PUC seeks clarification on whether it may "adjudicate intercarrier compensation disputes when they arise between competitive local exchange carriers (CLECs) outside Sections 251 and 252, 47 U.S.C. § 251 and 252, when they involve the exchange of local dial-up Internet traffic, and when the Pa. PUC decision properly enforces the *ISP Remand Order*⁷ and is consistent with Commission rules."⁸ The Pa. PUC asks the FCC to find that "the Pa. PUC has jurisdiction to adjudicate such disputes so long as the result is consistent with the *ISP Remand Order* and applicable law."⁹ The issue goes beyond dial-up ISP-bound traffic, however, as the petition asks the FCC to "provide affirmative guidance on whether state commissions retain jurisdiction to deal with matters arising from the exchange of traffic between directly and indirectly interconnected carriers, including intercarrier compensation disputes involving local ISP-bound traffic, through the proper application of federal and state law."¹⁰ Alternatively, if the FCC disagrees with making this finding, the Pa. PUC asks the FCC to issue a declaratory ruling describing the procedures that the Pa. PUC, and possibly other states, are to follow for transferring to the FCC all current and future intercarrier compensation disputes and adjudications involving local dial-up ISP-bound traffic exchanged between indirectly interconnected CLECs.

The petition was prompted by a recent decision and an accompanying Memorandum of Law of the U.S. District Court for the Eastern District of Pennsylvania (District Court), which overturned a ruling of the Pa. PUC on an intercarrier compensation dispute between AT&T Communications of Pennsylvania, LLC and TCG Pittsburgh, Inc. (collectively, AT&T), and Core Communications, Inc. (Core). The Pa. PUC issued a series of orders adjudicating complaints Core filed against AT&T on the indirect exchange and termination of dial-up ISP-

⁵ Wireline Competition Bureau Seeks Comment on Petition for Declaratory Order Regarding State Jurisdiction to Adjudicate Intercarrier Compensation Disputes Concerning Dial-Up ISP-Bound Traffic, WC Docket No. 14-70, (DA No. 14-674); rel. May 16, 2014.

⁶ Petition for Declaratory Order of the Pennsylvania Public Utility Commission, WC Docket No. 14-70 (filed April 30, 2014) (Petition), <http://apps.fcc.gov/ecfs/document/view?id=7521124305>.

⁷ *Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001), Order on Remand, 24 FCC Rcd 6475 (2008).

⁸ Petition at 1.

⁹ *Id.*

¹⁰ Petition at 4-5.

bound traffic. The Pa. PUC resolved the disputes by applying the FCC's capped rate of \$0.0007 MOU (minutes of use) established in the *ISP Remand Order*.

AT&T appealed to the District Court, where it claimed that the states are totally preempted and lack jurisdiction to resolve such intercarrier compensation disputes between CLECs without an interconnection agreement because the relevant exchange of ISP-bound traffic between the indirectly interconnected CLECs falls outside the scope of §§ 251 and 252 of the Act. The District Court adopted AT&T's position and overturned the Pa. PUC's rulings.

The Pa. PUC's petition states that the District Court decision called into question the traditional practice of state commissions' addressing intercarrier compensation disputes between CLECs that involve the exchange of dial-up ISP-bound traffic. The Pa. PUC argues that the division the District Court's decision creates also conflicts with the Pa. PUC's jurisdiction under state law to adjudicate this intercarrier compensation dispute between Core and AT&T, as well as other similar disputes. The Pa. PUC notes that both Core and AT&T are facilities-based CLECs certified by the Pa. PUC to provide local exchange telecommunications services in Pennsylvania.

The Pa. PUC petition also refers to a Ninth Circuit case involving the CPUC, *AT&T v. Pac-West Telecomm*, 651 F.3d 980 (9th Cir. 2011) (*Pac-West*). That case involved a dispute before the CPUC between two CLECs, AT&T and Pac-West, concerning the rate that applied for Pac-West's termination of ISP-bound traffic. The parties in the *Pac-West* case had not entered into an interconnection agreement. The CPUC determined that the FCC's *ISP Remand Order* did not apply (as it was traffic exchanged between CLECs) and that Pac-West's intrastate tariffs should apply. The appeal made its way to the Ninth Circuit, which invited the FCC to weigh in on whether its *ISP Remand Order* applied to CLEC-CLEC traffic, and whether, in the absence of an interconnection agreement, the CPUC had jurisdiction to hear a dispute over compensation due one CLEC for the termination of indirectly-exchanged ISP-bound traffic originating with another CLEC.

The FCC filed an *Amicus* brief stating that its *ISP Remand Order* does apply to CLEC-CLEC dial-up ISP-bound traffic. However, the FCC refrained from advising the Ninth Circuit whether a state commission would have jurisdiction to resolve a CLEC-CLEC dispute by applying federal law, stating that "[t]he FCC in its rules and orders has not directly spoken to the issue whether the CPUC would have jurisdiction to resolve this dispute applying federal law and accordingly the FCC in this *amicus* brief takes no position on that issue."

In its petition, the Pa. PUC states that its orders relied in part on the Ninth Circuit decision and the FCC's *Amicus* brief in the *Pac-West* case. The Pa. PUC reasoned that while the FCC has preempted state commissions from setting the rate for the exchange of the traffic at issue in a manner that is inconsistent with the *ISP Remand Order*, the Pa. PUC still retained authority to adjudicate the dispute and apply the federal rate set forth in the *ISP Remand Order*.

DISCUSSION AND RECOMMENDATIONS: Staff recommends the CPUC file comments in support of the Pa. PUC Petition. The Pa. PUC is seeking a declaratory ruling not only clarifying whether state commissions have authority to resolve disputes between CLECs by applying federal law, but also is asking the FCC to confirm that states do in fact already have such

authority. Staff recommends the CPUC support the request for resolution on the issue and support the Pa. PUC's claim that states do in fact have this authority under their current regulatory power.

The CPUC has already taken a position on this issue in its decisions as well as before federal courts (and indeed has exercised jurisdiction to hear disputes between CLECs over the termination of indirectly-exchanged ISP-bound traffic originating with another CLEC), and likely will be confronted with challenges to its jurisdiction in future cases. The CPUC has often been called upon to resolve CLEC-CLEC (as well as ILEC-CLEC disputes), and in this context has reaffirmed the "obligations of telecommunications carriers to complete calls even if underlying intercarrier arrangements for certain calls do not compensate them in a proper manner in the opinion of the carriers."¹¹ In the *Pac-West* case, the CPUC took the position before the Ninth Circuit that state commissions are given authority to mediate disputes between local carriers, even when this touches on jurisdictionally interstate traffic, and even where there is no interconnection agreement.¹² The CPUC also stated that it is statutorily authorized to hear complaints between CLECs under the California Constitution and Public Utilities Code.

Moreover, state commissions, like the CPUC, have traditionally adjudicated intercarrier compensation disputes, both for carriers that have interconnection agreements pursuant to 47 U.S.C. §§ 251 and 252 of the 1996 Telecommunications Act, and for carriers that exchange traffic indirectly without formal compensation arrangements. The Pa. PUC notes that the Penn. District Court departs from this practice, and results in a two-track agency approach involving disputes between indirectly interconnected carriers over dial-up ISP-bound traffic -one where states may only adjudicate intercarrier compensation claims under §§251/252 and another for the FCC in all other instances.

As the CPUC has previously spoken to this jurisdictional issue, is likely to face challenges to its jurisdiction in future cases, and may be presented with similar ill-effects of the District Court's decision (uncertainty in its adjudicatory role in these disputes as well as financial and regulatory uncertainty for affected carriers in California), the CPUC should file comments in support of the Pa. PUC's petition for declaratory ruling. The comments would support the request for resolution of the issue from the FCC by affirming that state commissions retain jurisdiction to resolve such disputes, or in the alternative, by describing the procedures for transferring to the FCC all intercarrier compensation disputes and adjudications involving local dial-up ISP-bound traffic exchanged between indirectly interconnected CLECs.

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¹¹ D.97-11-024, 76 CPUC 2d 458, 458 (1997), citing P.U. Code § 558.

¹² See, Brief of Appellee CPUC, filed in *Pac-West*, *supra*, at p. 29 (filed Mar. 13, 2009); see also, D.07-01-004 (*Cox Telecom v. Global NAPs*), affirmed *sub nom. Global NAPs v. CPUC*, CV 07-04801 MMM (SSx) (C.D.Cal. 2007), December 23, 2008 Order Granting Summary Judgment. *Cox v. Global NAPs* involved a dispute between two CLECs regarding the termination of traffic (IP-PSTN traffic) alleged to be interstate and beyond the CPUC's jurisdiction. The Court in that case found nothing in the Act or the FCC's orders on IP-related traffic to preempt the CPUC's adjudication of this dispute.